IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JANUARY 1996 SESSION

STATE OF TENNESSEE,	)	
	)	
APPELLEE,	)	
	)	No. 03-C-01-9508-CC-00218
	)	
	)	Blount County
v.	)	
	)	Rex Henry Ogle, Judge
	)	
	)	(Contributing to the Delinquency of a Minor)
DOUGLAS BRIAN IRWIN,	)	
	)	
APPELLANT.	)	

FOR THE APPELLANT:

Gerald C. Russell
Attorney at Law
125 East Broadway Avenue
Maryville, TN 37084

FOR THE APPELLEE:

Charles W. Burson
Attorney General & Reporter
450 James Robertson Parkway
Nashville, TN 37243-0497

Hunt S. Brown
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

Michael L. Flynn
District Attorney General
363 Court Street
Maryville, TN 37804-5906

Edward P. Bailey, Jr.
Assistant District Attorney General
363 Court Street
Maryville, TN 37804-5906

OPINION FILED:_____

AFFIRMED

Joe B. Jones, Presiding Judge

O P I N I O N

The appellant, Douglas Brian Irwin, entered a plea of guilty to the offense of contributing to the delinquency of a minor, a Class A misdemeanor. The trial court sentenced the appellant to serve eleven months and twenty-nine days in the Blount County Jail. The sentence was suspended, and the appellant was granted immediate probation. The appellant, with the consent of the trial court and the assistant district attorney general, reserved the following certified question: "Would the act of this sexual intercourse constitute the offense of contributing to the delinquency of a minor under this indictment number C-7302?" The parties agree that this issue is dispositive of the prosecution in this case. See Tenn. R. App. P. 3(b); Tenn. R. Crim. P. 37(b)(2)(iv). After a thorough review of the record, the briefs of the respective parties, and the authorities that govern the issue presented for review, it is the opinion of this Court that the judgment of the trial court should be affirmed.

On June 7, 1993, the Blount County Grand Jury returned a one count indictment charging the appellant with contributing to the delinquency of a minor. The indictment charged that:

> DOUGLAS BRIAN IRWIN, on the 18th day of December 1992, in Blount County, Tennessee, and before the finding of this indictment, did unlawfully contribute to the delinquency of [S.A.], a child under 18 years of age, by engaging in sexual intercourse with said child, all of which is against the peace and dignity of the State of Tennessee.

The appellant filed a "Motion to Dismiss Indictment" on September 28, 1993. The motion moved the trial court to enter an order dismissing "the indictment in this case because it does not charge a crime." The next day, September 29, 1993, the appellant filed a document entitled: "Defendant's Withdrawal of Motion to Dismiss Indictment." This document alleged: "Comes the Defendant, through his attorney, and withdraws the Motion to Dismiss Indictment, which was filed September 28, 1993."

The appellant entered a plea of guilty to the indictment on December 14, 1993. The trial court accepted the plea. However, the trial court did not conduct a sentencing hearing or impose a sentence. Apparently, the parties and the trial court agreed to hold sentencing

in abeyance until this Court ruled upon the issue raised by the appellant.

This Court considered the appellant's appeal at the October 1994 Session. The appeal was dismissed because the judgment of the trial court was not final. See State v. Douglas Brian Irwin, Blount County No. 03-C-01-9403-CR-00100 (Tenn. Crim. App., Knoxville, April 26, 1995). The appellant returned to the trial court, a judgment setting the sentence was entered on July 11, 1995, and he now seeks to have this Court decide the identical certified question he raised in the first appeal.

While the motion filed and then withdrawn stated the indictment failed to state a criminal offense, the appellant does not make that assertion in this Court. Instead, the appellant wants this Court to decide whether he is guilty of contributing to the delinquency based upon the facts stipulated by the parties. In the prior opinion, this Court noted that the stipulated facts were inadequate to permit this Court to review the issue as posed. This Court stated that: "We may presume that the fact of that sexual intercourse as stipulated in this case did not occur in a vacuum and we should refrain from trying to interpret the supposedly applicable law as if it did. . . . [T]he answer to the proposed question under the stipulated facts regarding whether or not they constitute the crime as charged is -- maybe, maybe not." Irwin, slip op. at 3, n. 2. However, this Court cannot decide the issue raised regardless of the facts.

Before a party may litigate an issue in an appellate court, the party seeking relief must preserve the issue for review. As a general rule, an appellate court will not consider an issue unless the issue was brought to the attention of the trial court, and the trial court ruled upon the issue. Tenn. R. App. P. 36(a); State v. Kinner, 701 S.W.2d 224, 227 (Tenn. Crim. App.), per. app. denied (Tenn. 1985) (the record did not reflect that a pretrial motion was brought to the attention of the trial court); State v. Burtis, 664 S.W.2d 305, 310 (Tenn. Crim. App.), per. app. denied (Tenn. 1983) (record did not reflect that a motion to suppress identification evidence was brought to the attention of the trial court); see State v. Locke, 771 S.W.2d 132, 138 (Tenn. Crim. App. 1988), per. app. denied (Tenn. 1989). In Kinner, this Court said that "[t]he filing of a motion with the clerk without presenting it to the trial court for determination is of no effect." 701 S.W.2d at 227. Otherwise, the motion will be considered abandoned. See State v. Alexander, 711 S.W.2d 609, 611 (Tenn. Crim. App.),

per. app. denied (Tenn. 1986).

In this jurisdiction, "[d]efenses and objections based on defects in the indictment, presentment[,] or information (other than it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings)" must be raised by motion prior to trial. Tenn R. Crim. P. Rule 12(b)(2); see State v. Joyner, 759 S.W.2d 422, 425 (Tenn. Crim. App. 1987), per. app. denied (Tenn. 1988). The failure to follow this rule results in the waiver of the issue sought to be raised. Tenn. R. Crim. P. 12(f). See Joyner, 759 S.W.2d at 425; State v. Bowers, 673 S.W.2d 887, 888 (Tenn. Crim. App.), per. app. denied (Tenn. 1984). The waiver rule has been extended to an accused's failure to assert the constitutionality of the statute proscribing the conduct alleged in the charging instrument. State v. Rhoden, 739 S.W.2d 6, 10 (Tenn. Crim. App.), per. app. denied (Tenn. 1987); State v. Farmer, 675 S.W.2d 212, 214 (Tenn. Crim. App. 1984).

As previously stated, the appellant filed a motion challenging the indictment. He contended in the motion that the indictment failed to state a crime. However, the appellant voluntarily dismissed the motion the day after it was filed without bringing the motion to the attention of the trial court. Consequently, the trial court has never ruled upon the issue certified as dispositive of the prosecution.

The appellant has waived the issue presented for review. The record is silent as to why the appellant dismissed the motion the day after it was filed. However, it is clear that the appellant was aware of the issue, made an attempt to have the issue resolved, and knowingly and voluntarily opted not to challenge the indictment. In short, an appellate court will not consider an issue, certified as dispositive of the prosecution, if the issue has been waived.

This Court is aware that Rule 12(b)(2), Tenn. R. Crim. P., provides that the jurisdiction of the trial court or the failure of a charging instrument to state a crime may be raised at any stage of the proceeding. In addition, this Court may consider an issue that has not been raised or has been waived if (1) a "substantial right" of the accused has been affected when "necessary to do substantial justice," Tenn. R. Crim. P. 52(b) or (2) either the trial court or this Court does not have subject matter jurisdiction or "to prevent needless

litigation," "to prevent injury to the interests of the public," or "to prevent prejudice to the judicial process." Tenn. R. App. P. 13(b); see State v. Adkisson, 899 S.W.2d 626, 636-42 (Tenn. Crim. App. 1994); State v. Seagraves, 837 S.W.2d 615, 617-18 (Tenn. Crim. App.), per. app. denied (Tenn. 1992). However, this Court refuses to exercise its discretion and consider the issue on the merits. In this Court's opinion, neither rule is implicated. See State v. Adkisson, supra.

_____
JOE B. JONES, PRESIDING JUDGE

CONCUR:

_____
JOHN H. PEAY, JUDGE

_____
DAVID H. WELLES, JUDGE